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Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBIA BROADCASTING SYSTEM, INC.,

Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALAN J. HRUSKA
One Chase Manhattan Plaza
New York, N. Y. 10005
(212) 422-3000

Attorney for Petitioner

Of Counsel:
DAVID BOIES
LOUIS M. SOLOMON
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

August 29, 1980

QUESTIONS PRESENTED

The practice asserted in this case to be an unreasonable restraint of trade (in violation of Section 1 of the Sherman Act) is an arrangement by which a nationwide combination of sellers (owners of copyrighted music) (a) pool their rights, (b) have a committee of their representatives sell their customers all-or-nothing requirements contracts to the pool, and (c) have that committee (i) set the price for each such contract, and (ii) set the amount each member will receive in respect of each customer's use of pooled copyrights.*

On a prior grant of certiorari, this Court reversed a decision by the Court of Appeals for the Second Circuit that this practice was illegal *per se* and remanded with instructions for an analysis to be made under the rule of reason as to whether the arrangement was necessary in order to make a market in which individual sellers "are inherently unable to compete fully effectively" (C23, 25) or otherwise had "redeeming competitive virtues" (C12).**

The court of appeals has now held, on remand, that the practice in question has no anticompetitive effect at

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* All references in this petition to the practice complained of are intended to relate solely to the practice as applied to the relevant market: the licensing of nondramatic music performance rights for television network programs.

** Pages of the Appendices to this petition are cited herein by reference to the letter of the Appendix and the page number, as shown above.

Portions of the record on appeal in this action appear in the Joint Appendix used before the court of appeals and before this Court during the prior certiorari process, docket nos. 77-1578 and 77-1583, and are cited as indicated below:

Vol. No.	Type of Document	Cited As
1-2	Pleadings, briefs, affidavits, and opinions	"JA"
3-6	Trial transcript	"Tr."
17-19	Depositions	"Dep."
20-24	Trial Exhibits	"EX"

References to portions of the record not appearing in the Joint Appendix are cited to the record on appeal (*e.g.*, Plaintiff's Exhibit ("PX"), ASCAP's Exhibit ("AX")).

all, and thus no procompetitive benefits need be shown, because it is a nonexclusive method of sale (in the sense that defendants* have been enjoined in a Government suit from continuing to enforce agreements prohibiting direct dealings between members and their customers) and because it is totally unnecessary (in the sense that such direct dealings would be transactionally feasible).

The questions on which we seek review are the following:

1. Whether the court of appeals' decision that the practice complained of has no anticompetitive effect at all conflicts with this Court's opinion and directions on remand for an analysis as to whether the practice had redeeming procompetitive virtues?

2. Whether the court of appeals erred in holding that this nationwide joint sales arrangement is entirely free of any restraint because it is nonexclusive and unnecessary?

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* Defendants, respondents herein, are: American Society of Composers, Authors and Publishers ("ASCAP"); Stanley Adams, as President of ASCAP; Harold Arlen, Samuel Barber, Carl Fischer, Inc., Chappell & Co., Inc., Cy Coleman, Edwin H. Morris & Co., Inc., Elkan-Vogel, Inc., Essex Music, Inc., Famous Music Corp., G. Schirmer, Inc., Morton Gould, Arthur Hamilton, Henry N. Mancini, MCA, Inc., Peter Mennin, Milene Music, Inc., Robbins Music Corporation, Richard Rodgers, Arthur Schwarz, Shapiro, Bernstein & Co., Inc., Warner Brothers-7 Arts Inc., Ned Washington, on behalf of themselves and all other members of ASCAP; Broadcast Music Inc. ("BMI"); Al Gallico Music Corp., Paul Anka, Associated Music Publishers, Inc., Jerry Bock, Duchess Music Corp., Fred Ebb, Edward B. Marks Music Corp., Norman Gimbel, Sheldon Harnick, Hill and Range Songs, Inc., Hollis Music, Inc., John Kander, Charles Koppelman, Maclen Music, Inc., Peer International Corporation, Don Rubin, Screen Gems-Columbia Music, Inc., Joseph Stein, Sunbeam Music, Inc., Unart Music Corp., on behalf of themselves and all others who have granted BMI the right to license to third parties nondramatic performing rights of their copyrighted music. The district court certified the case as a defendant class action. 400 F. Supp. 737, 741 n.2 (S.D.N.Y. 1975). Unless the context indicates otherwise, references to ASCAP alone apply to BMI as well.

Since the commencement of this suit, petitioner's corporate name has been changed from Columbia Broadcasting System, Inc., to CBS Inc. ("CBS").

3. Whether the court of appeals erred in holding to be irrelevant (by necessary implication):

(a) defendants' repeated, categorical, judicial admissions that:

(i) the purpose of this joint sales arrangement is to increase prices over competitive market levels; and

(ii) the amounts they mutually set for their own distributions in respect of each use made by customers of the pooled copyrights would influence prices set in any direct sales transactions between individual sellers and buyers;

(b) the district court's finding that for any buyer to commence filling its requirements by such direct transactions would require at least one year of advance preparation;

(c) the sellers' further concessions that they would exact premium prices (*i.e.*, in excess of competitive market prices) in direct transactions involving a significant portion of each buyer's requirements (*i.e.*, "music-in-the-can"); and

(d) the court of appeals' own prior finding that the present joint sales arrangement inevitably dulls the members' incentive to compete, provides a disinclination to compete, and reduces price competition?

4. Whether the court of appeals' decision on remand conflicts with numerous other decisions of this Court, *e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, — U.S. —, 100 S. Ct. 1925 (1980) (per curiam); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *United States v. Container Corp.*, 393 U.S. 333 (1969); *Nationwide Trailer Rental System, Inc. v. United States*, 355 U.S. 10 (1957), *aff'g per curiam*, 156 F. Supp. 800 (D. Kan. 1957); *United States v. National Ass'n of Real*

Estate Boards, 339 U.S. 485 (1950); *United States v. Masonite Corp.*, 316 U.S. 265 (1942)?

5. Whether the court of appeals' decision on remand conflicts with decisions of other courts of appeals, *e.g.*, *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128 (9th Cir. 1960)?

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TABLE OF AUTHORITIES

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Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 23

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner CBS asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 3, 1980.

PRIOR OPINIONS

The opinion of the court of appeals, on remand from this Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, is reported at 620 F.2d 930 (2d Cir. 1980) and appears as Appendix A to this petition. The court of appeals' opinion denying defendants' motions for summary affirmance is reported at 607 F.2d 543 (2d Cir. 1979) and appears as Appendix B. The opinion of this Court remanding the case to the court of appeals, with a dissenting opinion by Mr. Justice Stevens, is reported at 441 U.S. 1, 99 S. Ct. 1551, 60 L.Ed.2d 1 (1979) and appears as Appendix C.

The majority and concurring opinions of the court of appeals which were previously reviewed by this Court are reported at 562 F.2d 130 (2d Cir. 1977) and appear as

Appendix D. The opinion of the United States District Court for the Southern District of New York, reported at 400 F. Supp. 737 (S.D.N.Y. 1975), appears as Appendix E.

JURISDICTION

The judgment of the court of appeals, entered on April 3, 1980, appears as Appendix F to this petition. The orders of that court of June 2, 1980, denying a timely petition for rehearing and suggestion for rehearing en banc, appear as Appendix G. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 15 U.S.C. § 26 and 28 U.S.C. §§ 1331(a), 1337, and 1338(a).

STATUTE INVOLVED

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

STATEMENT OF THE CASE

A. Summary of Facts

The market involved in this case is the licensing of music performance rights for television network programs.[1]

By law, copyrights on musical compositions are granted to writers. By commercial practice, they are assigned by writers to music publishing corporations (D9 n.13). All major music publishing corporations and many thousands of writers are members of ASCAP, an unincorporated association which licenses the performance rights of its members' copyrighted music to broadcasters (including television networks) and certain other categories of users (E3-4; A4-5).[2]

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[1] On remand, all parties were called upon by the court of appeals to reconfirm that fact, did so, and the court of appeals so found (A8).

[2] Unless otherwise indicated, references to the licensing of music or of "performance rights" shall mean the licensing of nondramatic

In all music markets not occupied by ASCAP, music publishing corporations deal directly with their customers and compete vigorously on a price basis (C22 n.37; C34 & n.25 (Stevens, J.); D9 & n.13; E44-45).[3]

In the market involved in this case, ASCAP's members do neither (C33 (Stevens, J.); A10). Rather, having pooled their music within ASCAP, they authorize a committee of their representatives (the ASCAP Board) to license the pool to each television network at a single annual package price agreed upon by the Board (the "blanket license") (C3; E3-4).

ASCAP could license music for network programs use-at-a-time—*e.g.*, at $1,000-a-use—and distribute each such $1,000 to the members whose song was performed. For a television network user, that would amount to roughly $5 million a year. Instead, ASCAP elects to charge the network $5 million a year for a blanket license to the pool and distribute $1,000 in respect of each network use to the publisher and writer(s) of that composition (*see* C34 (Stevens, J.); D11 n.15).

The per-use method is "classical price-fixing," the court of appeals has opined (A12), because cosmetically it looks (and in reality it is) identical to a "hotel-room"

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performance rights. Other rights of musical copyright include dramatic rights (performances of music as part of dramatic works, such as musical comedies or operas); synchronization rights (recordings in the sound tracks of theatrical motion pictures or television programs in synchronization with filmed performances); mechanical rights (phonograph records or tapes); and print rights (sheet music) (*see* Berman Tr. 775-76; Mingle Tr. 852-53).

[3] The Harry Fox Agency, Inc., a subsidiary of the National Music Publishers Association, acts as agent for publishers in many of those transactions, charging either a list price posted by each publisher with Fox, or a price negotiated between the customer and Fox (in consultation with the publisher) (E44-45).

Direct customers of music publishing corporations include the producers of television programs (who buy synchronization rights) and the producers of theatrical motion pictures (who buy a combined performance and synchronization rights license in each transaction) (E5, 34-36, 43-45).

price fix. The blanket method, under which the members get the same $1,000-a-use, is not merely a literal, functional equivalent of the first; it imposes restraints on competition that exceed those inherent in a simple horizontal price arrangement (*see* C34 (Stevens, J.)).[4]

All parties have agreed, however, and the lower courts have found, that there is no necessity for collective licensing in this market (through ASCAP or otherwise, on a blanket, per-use, or any other collective basis) (E40, 63, 92; D9-10, 16; A14, 18). For it would be perfectly feasible for performance rights to be licensed in direct negotiations between, on the one hand, the music publishing corporations (which own previously published music), the writers of music specially composed for television programs, or their respective agents, and, on the other hand, the program producers (either the independent packagers or the networks themselves, to the limited extent networks produce their own programs) (*id.*). It is also undisputed that a competitive market would come into existence if all music for new television programs were licensed directly (*e.g.*, D16, 18).[5]

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[4] For example, under a per-use license, where the network would pay a separate price for each use of music, it could save money by using less music. Under the blanket system, the network must pay the same annual fee, whether it uses 5,000 compositions a year or 500.

Also, until the facilities were established for total direct dealings, the producer could utilize the ASCAP per-use license when necessary, and directly license the remainder of his uses (*i.e.*, bypass ASCAP use-at-a-time). To engage in direct licensing while the blanket license was in effect would mean paying twice for the same music.

Furthermore, under the per-use system, there would be some small degree of price competition among directly licensed songs, even though the prices on such transactions would be influenced by the collectively set ASCAP per-use prices.

Of course, if per-use prices were set by each copyright proprietor, without influence by ASCAP, genuine price competition would ensue. In effect, the price posted by the copyright proprietor with ASCAP would be a list price (in the same fashion that the music publishing corporations now post list prices with the Fox Agency, E44-45), with the producer free to accept that price or negotiate directly.

[5] For that reason, the principal relief CBS has sought in this case is an injunction against *any* licensing by ASCAP of television networks

If, on the other hand, a single television network independently attempted to create such a market (by cancelling its ASCAP blanket license and asking packagers to license music directly), at least three problems attributable to the present system would arise:

First, the price of directly licensed uses would be impacted by ASCAP's schedule of per-use distributions to its members ($1,000-a-use for feature performances, and corresponding amounts for theme or background uses). These figures, as ASCAP admitted to the district court, "would inevitably become the focal point around which any direct licensing transactions would take place" (ASCAP's "Comments on CBS' Latest Statement of the Elements of a Per-Use License," May 24, 1973, at 2). And, as BMI conceded in its 1978 certiorari petition to this Court:

> "To be sure, the price of a BMI license—like any other price in a market—has an effect on what would be charged in direct licensing transactions. . . . Thus, the price of a blanket license acts as a check on direct license prices . . . ." Pet. 15.[6]

Second, when the national television networks were formed in the mid-1940's (A5), ASCAP had the *exclusive* right to license performance rights to broadcasters with respect to virtually all music copyrighted in the free world (C9-10; D4-5). It did so (as now) only on a blanket basis, so that all networks took ASCAP blanket licenses.

Each network thereupon acquired a substantial inventory of rights to telecast theatrical motion pictures, and the sound tracks of such films contained performances

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(with an interim solution for the "music-in-the-can" problem, *see* pp. 5-7, 26 n.22 *infra*). As an alternative, and only in the event the court declined to grant such an injunction *and* ASCAP continued to refuse to withdraw from the market, CBS requested the adoption of a per-use method of licensing as interim relief until collective licensing (a term which includes per-use licensing) could be phased out completely.

[6] *See also* further concessions to the same effect and the views of the Department of Justice on the point, collected pp. 23-24 & n.21 *infra*.

of copyrighted music ("music-in-the-can"). At the present time, CBS has an inventory of programs and films worth more than $100,000,000 and containing more than 13,000 songs (Sipes Tr. 52; PX's 994, 995 (paras. 1-2); *see* D10 n.14; E79).

For any one film that CBS paid (for example) $2,000,000 for the right to telecast twice in three years, the composer of the theme and background music (which may be the only music used in that film) would obviously possess the economic leverage to command an unusually high price, if CBS's blanket license had been terminated. Unless CBS paid that fee, its telecast of the film could be enjoined, and it would be out-of-pocket $2,000,000.

BMI admitted that the music-in-the-can problem would be "intolerable" to a television network because it was a situation in which the copyright proprietor could "name his price" (BMI Trial Memorandum, dated April 25, 1973, at 35-36, JA 354); ASCAP's economic expert witness testified to the lesser, but material point: that it would inflate the price over competitive market levels (Nathan Tr. 3903, 4052).

At any given time since 1950 (when ASCAP's rights were rendered "nonexclusive" by decree, *see* C10), each network had this problem, varying only in degree, even while possessing the legal right to license such music-in-the-can directly (*see* C38 n.31 (Stevens, J.)). There was no solution to the problem in deferring a cancellation of the ASCAP blanket license until existing inventory could be exhausted and in the meantime buying performance rights to the music already recorded in films on which the network wished to bid in the future. Were the network to try that, the owners of the music recorded in such non-inventory films would still have the leverage to charge supracompetitive prices. Such leverage would derive, not from the fact that the bypassing network had already paid for the films, but from the fact that the network would be placed at a competitive disadvantage if, by failing to meet the copyright owners' demands, it were precluded from bidding on this vast source of program-

ming material while blanket-licensed networks were not.[7] And no solution to the problem could be gained by requesting an ASCAP license limited to music-in-the-can, since ASCAP refuses to license except on an all-or-nothing blanket basis (C28 (Stevens, J.); *see* A10).[8]

Third, because of the need to use up the present inventory of music-in-the-can before launching an attempted bypass of ASCAP, and the need to persuade the music publishing corporations to create the necessary direct licensing facilities (against their own strong economic incentives to maintain the status quo, *see* C37 n.30 (Stevens, J.); D20; E60-61), the commencement of direct dealings, even at supracompetitive prices, would be delayed for a substantial period of time (the district court found the "inevitable" period to be one year, E42, 84; *see also* p. 21 & n.19 *infra*).

B. Proceedings Below

1. *The Decision of the District Court*

The district court held as a matter of law that the historical elimination of price competition achieved by the

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[7] In a market characterized entirely by direct licensing, all three networks would be in the same boat with regard to these non-inventory films and programs. To be sure, the copyright owners would still have incremental leverage as the single source of each such song (*i.e.*, greater leverage than they would have prior to the filming of a performance when other songs having a higher price/benefit value to the film could be substituted). But they would not possess the additional single-source leverage of being able to play a bypassing network (which could not obtain extremely valuable motion pictures without getting them to deal for the songs) against two other networks (which had no need for direct licenses).

[8] Such a limited license was requested, in effect, by NBC in 1970, *United States v. ASCAP (Application of National Broadcasting Company)*, 1971 Trade Cas. ¶ 73,491 (S.D.N.Y. 1970); *see* NBC's prior *amicus* brief to this Court in this case (at 7). ASCAP's reason for refusing was that it would enable NBC to license the remainder of its uses directly and thus "to drive down the price for performance rights" (Reply Affidavit of Herman Finkelstein, General Counsel of ASCAP, sworn to May 15, 1970, and submitted in opposition to NBC's application, ¶¶ 7, 9, 10; *see also United States v. ASCAP*, *supra*, 1971 Trade Cas. at 90,009).

blanket license imposed no restraint whatever on price competition because each television network, in the light of the potential feasibility of direct dealings, could avoid the blanket license (E40, 63, 92).

The district court's key finding of fact in that connection was that direct licensing would be "feasible," "convenient," and "efficient." [9] Further, the district court found that the music publishing corporations did not need ASCAP to continue *licensing* networks in order for the publishers to conduct whatever *monitoring* of network uses they desired, through ASCAP or otherwise (E93-94 n.23).[10]

2. *The First Court of Appeals Decision and the Decision of This Court*

The court of appeals originally reversed the district court's decision on the facts as the district court found them (although the court of appeals stated several of the essential findings in its own terms).

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[9] The district court found that the licensing of "inside" music (that written especially for the program or owned by a publisher-affiliate of the packager) could be directly licensed "conveniently" (E40) and that the direct licensing of "outside" music would be "efficient" (E55). With respect to the latter, the court stated that the music publishing corporations "would logically create an *efficient* mechanism to facilitate it [direct licensing] (as they have in the case of other music rights)" (*id.*, emphasis added).

[10] It might be noted the music publishing corporations do not ask the Fox Agency to perform any systematic monitoring of motion pictures, phonograph records, or sheet music. Those users are essentially self-policing—a system that works, the Agency affirms, because the penalties for infringement are severe and the possibility of detection, high (*see* Mingle Tr. 883-85).

In contrast, ASCAP now maintains an elaborate system of monitoring each and every network use of music in order to make per-use distributions of blanket license revenues to its members (*e.g.*, Marks Tr. 2465-72). But if all music licensing for network programs were done in direct transactions between publisher (or composer) and producer, as it now is for synchronization rights (through the Fox Agency or otherwise, *see* E44-45), there would be (by definition) no *blanket* licensing revenues to distribute, and no need for monitoring on this elaborate scale, if any.

As subsequently viewed by this Court, the court of appeals held that the blanket licensing practice was illegal *per se* and also adopted "a rather bobtailed application of the rule of reason, bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular licensing system is an undue competitive restraint" (C17 n.27).

The court of appeals, however, *did* find that the blanket license involves "at least the threshold elimination of price competition" and "the fixing of a collective price"; gives the ASCAP member a "distributive share of the common royalties [that] may be greater than the royalty he would receive in a free market"; "provides a disinclination to compete"; "inevitably" "dulls" the members' "incentive to compete"; and "reduces price competition" (D11-12, 20, 22). The court of appeals also found that a "direct negotiating market can surely exist if the blanket license is eliminated" (D16).

Moreover, the court of appeals held (consistent with the later opinion of this Court) that while the *in*feasibility of direct dealings would justify collective licensing (in markets in which such *in*feasibility had been proven, D13-16), the *feasibility* of direct dealings (proven here) precluded any such justification (D11, 16-17).

What the court of appeals failed to consider, according to this Court, was (a) whether direct licensing in the network market, despite its feasibility, would nevertheless be so transactionally inefficient as to produce "a market in which individual [sellers would be] inherently unable to compete fully effectively" (C23) (as the Court assumed to be true of the radio stations market, C20-21);[11]

[11] Although such a conclusion as to the television network market would have been contrary to the district court's findings and to defendants' own arguments below, it could not itself have supported a dismissal even if accurate. For while it would have indicated that some form of collective licensing was "reasonably necessary" (C19; *see* C24), the court would still have had to determine whether the *blanket* form of collective licensing was more restrictive than reasonably necessary to achieve those efficiencies or whether some other form of collective

or (b) whether the restraints inherent in collective pricing could be justified by some other procompetitive factor.[12]

Given defendants' position on remand, however (disdaining any argument of justification), all that was left for the court of appeals to do in order to apply the guidelines laid down by this Court was to reaffirm its earlier finding that a "direct negotiating market can surely exist if the blanket license is eliminated" (D16), reaffirm and particularize the district court's findings that direct licensing in this market would be "convenient" and "efficient" (*see* p. 8 & n.9 *supra*), and note that no "redeeming competitive virtues" (C12) of any sort had been shown.[13]

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licensing, such as per-use licensing, was a significantly less restrictive alternative. C34 (Stevens, J.); *White Motor Co. v. United States*, 372 U.S. 253, 270 (1963) (Brennan, J., concurring); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979), *cert. denied*, — U.S.—, 100 S. Ct. 1061 (1980); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1185, 1187-89 (D.C. Cir. 1978); Brief of the United States (submitted to the court below and reproduced as Appendix H in the accompanying appendix) H13, 18-19; *see National Society of Professional Engineers v. United States*, 435 U.S. 679, 690-91, 694-96 (1978); *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

[12] In point of fact, defendants failed to argue any procompetitive justification on remand; for none could be substantiated by this record, or exists.

Thus, as the Department of Justice attorney acknowledged on remand near the conclusion of the oral arguments that had occupied an entire day:

"JUDGE GURFEIN: You have sat here and listened to the arguments. What have you heard to be alleged as the pro-competitive effects?

"MR. GROSSMAN: With respect to the networks?

"JUDGE GURFEIN: Yes.

"MR. GROSSMAN: I have not heard." Tr. 213.

[13] We are mindful of the fact that this Court stated that "ASCAP reduces costs absolutely" while further observing that "the necessity for and advantages of a blanket license for [television network] users may be far less obvious than" they are for a radio station (C21).

But, of course, any combination of sellers could reduce transaction costs "absolutely" by pooling their products or rights and jointly selling annual requirements contracts to the pool. For each customer, there

3. *The Court of Appeals Decision on Remand*

The court of appeals, however, rejected this Court's analytical framework and adopted *in toto* the district court's central holding of law.

Thus, having determined in its first opinion that the restraints imposed by blanket licensing were so inherently unreasonable as to render the practice unlawful *per se*, the court of appeals determined on remand that blanket licensing imposed no restraints whatever (A8, 9-10, 19).

The very factor which, to the court of appeals, exonerated blanket licensing of any restraint was the same feasibility of direct dealings that this Court (and the court of appeals in its first opinion) indicated would cut *against* any justification for the practice (*compare* C20-21, 23 *and* D10-11, 13-16 *with* A14, 18).

Moreover, while the court of appeals thus deemed *blanket* licensing to be free of any restraint because of the feasibility of direct dealings, it ruled that precisely such feasibility would render the less restrictive *per-use* licensing "classically" illegal (A12).[14]

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would be one transaction a year instead of many; most salesmen could be fired; and most sales facilities could be disbanded.

(At the same time, the combination would add considerable new costs of an institutional or bureaucratic nature (*see, e.g.*, p. 8 n.10 *supra*), and, inevitably, inflate price, either or both of which would probably more than offset the sort of transactional savings just mentioned. *Compare, e.g.*, the Harry Fox Agency's overhead of less than 5% of total revenues (which covers its entire licensing, billing, and distribution services as well as the small amount of monitoring it does) *with* ASCAP's overhead, which is annually close to or in excess of 20% of revenues (*e.g.*, AX 232; *see* Berman Tr. 837-38; Mingle Tr. 854, 858, 869-70).)

Logically, therefore, if any such market, or the market involved in this case, could operate with reasonably satisfactory efficiency on a normal, competitive, direct-dealings basis, then the restraint inherent in the collective pricing arrangement could not be justified on the "efficiency" ground. As shown below, the Department of Justice advocated precisely this approach in its *amicus* brief to the court of appeals (*see* pp. 13-14 *infra*).

[14] If per-use licensing is "classically" unlawful, as the court of appeals held, precisely because buyers have "a realistic opportunity to

And while the court of appeals concluded, toward the end of this opinion, that music-in-the-can prevented any "meaningful price competition among copyright owners," it also ruled earlier in its opinion that music-in-the-can did not restrain competition at all (*compare* A18-19 *with* A16-17).

And while the court of appeals had found in its first opinion that blanket licensing "*inevitably*" "dulls" ASCAP's members' "incentive to compete," "provides a disinclination to compete," and therefore "reduces price competition," the court in its second opinion found "some difficulty even contemplating" how such an anticompetitive effect could occur (*compare* D20, 22, emphasis added, *with* A16).[15]

4. *The Department of Justice Position on Remand*

In its *amicus* brief to the court of appeals (which this Court suggested be filed, *see* C25 n.44), the Department of Justice disclaimed sufficient familiarity with the record to be able to advise the court whether to affirm or reverse, but the legal analysis set forth in that brief could lead to only one conclusion.

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obtain performance rights from individual copyright holders" (A12), surely such feasibility of direct dealings cannot make blanket licensing perfectly lawful. To transform the per-use license into a blanket license merely intensifies the restraint (*see* p. 4 & n.4 *supra*).

What actually occurred here is that the court of appeals converted CBS's per-use proposal, on the issue of relief, into some fundamental flaw or "irony" in CBS's case on liability (A12 n.7; *see* p. 4 n.5 *supra*; C28 (Stevens, J.)). The court seemed to be saying that since CBS's alternative request for relief would also be unlawful as an original condition, CBS had no basis for attacking the practice complained of. What the court failed to apprehend is that CBS's claim of liability does not rest on an alternative form of relief; and that if, as we agree, a collective per-use system is classically unlawful, then blanket licensing is doubly so.

[15] Shortly after the court of appeals' decision, ASCAP and CBS culminated negotiations which had commenced in 1978 by entering into an interim licensing arrangement (retroactive to March 1978, *see* A14 n.8), pending the outcome of this petition.

The Government perceived that there were two "*factually undisputed anticompetitive characteristics* of the market" in question that represented "*substantial deviations from the competitive norm*" (H15, 17, emphasis added): (1) the "particularly significant" absence of price competition (H15); and (2) "the undisputed fact of price discrimination" (H18 n.11).

These "characteristics" of blanket licensing, the Government urged, "impose the burden on the defendants to justify its continued use" by showing, not only procompetitive benefits that outweigh the anticompetitive effects, but also that blanket licensing is "no more restrictive than necessary" to achieve any such benefits (H18-19; *see* H13).

The Government further emphasized the district court's error in failing properly to recognize the potential in this system for *additional* restraints in the event a network abandoned its blanket license (restraints in the form of "onerous" direct dealing terms and "supracompetitive prices," H17-18).

And the Government also stressed (H11), as had this Court (C19-20), the importance of evidence regarding anticompetitive intent (which this record abundantly substantiates,[16] although no such proof was referred to on remand by the court of appeals).

The Government brief was equally instructive as to the manner in which any alleged procompetitive factors should be assessed. Thus, the Government concluded that only those "efficiencies" which "are so significant that, without them, a competitive market could not function" (H20 n.15) could be held to offset significant anticompetitive effects, because:

> "To countenance a significant restraint of competition for cost savings alone would constitute an improper judicial rejection of the congressional determination that, in the long run, greater com-

[16] *See* p. 19 & n.18 *infra*.

petition provides the best means of lowering cost and spurring innovation." *Id.*

It should also be noted that, in 1971, after NBC applied to the consent decree court for a limited ASCAP license (covering music-in-the-can plus certain background music libraries, *see* p. 7 n.8 *supra*), the Department of Justice stated in its *amicus* brief to the Second Circuit (reproduced as Appendix I to this petition):

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local [radio] broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation." I11-12.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decision Is in Direct and Irreconcilable Conflict with the Mandate of this Court.

1. For at least the past 80 years, the Supreme Court, and all other federal courts, have recognized that, as Justice Brandeis wrote in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918): "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."

Despite the obviousness of that proposition, despite this Court's mandate in this case, and despite the court of

appeals' own prior conclusion that the blanket licensing arrangement was so inherently restrictive as to be unlawful *per se*, the court of appeals has now ruled that the practice is not restrictive at all, so that the issue as to its reasonableness does not even arise.

We do not ask this Court to review that holding simply because it is wrong, or simply because it defies this Court's directions, but primarily because, by doing both, it attacks and, left standing, would dangerously erode the most basic of antitrust principles.

Both that danger and that conflict are epitomized by these contrasting conclusions:

This Court ruled that sellers' cooperative arrangements are permitted, though having an impact on price, if the pricing agreement is reasonably "*necessary*" to market the product (C23-24, emphasis added).

The court of appeals, however, has now held that such cooperative arrangements are perfectly lawful so long as they are totally *unnecessary* (because direct dealings would be feasible and efficient) and no agreement among sellers actually prohibits such dealings.

2. But the conflict goes deeper than that.

In the first place, this Court *knew* that direct dealings were feasible (both from a transactional standpoint and because there were no contractual prohibitions against them). Indeed, this Court *knew* that the court of appeals and the district court had already found that direct dealings were feasible. The Court said:

> "[T]he District Court found, and in this respect the Court of Appeals agreed, that there are no practical impediments preventing direct dealing by the television networks if they so desire." C11-12.

If this Court thought that the feasibility of direct dealings meant that the blanket license imposed no restraint, it would have had no reason for sending this case back to the court of appeals—and certainly no reason for

asking that court to perform "the necessary analysis demonstrating why the particular licensing system is an *undue* competitive restraint" (C17 n.27, emphasis added). It would simply have affirmed the district court's decision as a matter of law, for that entire decision is based on the feasibility-equals-no-restraint fallacy.

In the second place, the court of appeals' conclusion of "no anticompetitive effect at all" (A8; *see* A9-10, 19) is flatly contradictory of this Court's explicit reasoning.

For example, this Court declined to apply the *per se* rule because of the possibility "that the challenged practice *may* have *redeeming* competitive virtues" (C12, emphasis added). What were such possible competitive virtues supposed to redeem if not a restraint on competition?

This Court noted that the "justification for the practice" in any market might be "undercut" by "new technology or new marketing techniques" (C21 n.34). Why talk about "justification" being "undercut" if the practice imposes no restraint to begin with?

This Court observed that the new Copyright Act authorized blanket licensing in certain other markets "[n]otwithstanding any provisions of the antitrust laws" (C15). Why would the blanket licensing practice have been given that exemption were it not for Congressional recognition that it imposed some restraint—and why would this Court have referred to that exemption absent the same recognition?

This Court clearly included blanket licensing among those "cooperative arrangements" that "have an impact on price" (C23-24), and such an impact indisputably constitutes a restraint.

Moreover, why would this Court have stated that the practice could not be "*wholly* equated with a simple horizontal arrangement among competitors," could not "*automatically* be declared illegal in *all* of its many manifestations," and "may not *ultimately* survive [a rule-of-reason] attack" (C24-25, emphasis added), unless the

Court recognized that there was some restraint inherent in this practice whose justification had to be considered.

3. Most important of all, this Court observed that in other markets (*e.g.*, those in which music selection was determined by the "disc-jockey's itchy fingers" or the "bandleader's restive baton," C22 n.37) ASCAP makes "a market in which individual composers are inherently unable to compete fully effectively" (C23). It was on that basis that the Court could conclude as to those markets that ASCAP may "not really" be said to be "a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material" (*id.*).

Plainly, when ASCAP does *not* make "a market in which individual composers are inherently unable to compete fully effectively"—as this Court indicated would be true of dramatic rights and synchronization rights (C22 n.37) and has been found to be true of the market here—then ASCAP *is* "a joint sales agency" administering a collective pricing arrangement (C23); and the restraint which obviously exists is *not* "reasonably necessary" (C19; *see* C24).

In short, to this Court, if (a) direct dealings were feasible and not so transactionally inefficient as to create a situation in which individual copyright proprietors could not fully effectively compete, and (b) no other procompetitive justification for the blanket license had been shown as to this market, then blanket licensing imposed a restraint lacking in "redeeming competitive virtues" (C12). But to the court of appeals, exactly the opposite was true: if direct dealings were feasible, and individual copyright proprietors could fully effectively compete, then the blanket license imposed no restraint whatever, and no issue of justification arose.[17]

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[17] The court of appeals concluded that it had been expressly left free to reach its determination of "no anticompetitive effect at all" (A8) by a passage of this Court's majority opinion.

The passage involved stated this Court's uncertainty as to whether the practice complained of was restrictive "on its face" (C13), with a

4. Mr. Justice Stevens' opinion in this case demonstrates how the rule-of-reason analysis mandated by this Court should be performed. We believe that the court of appeals erred in not reaching Mr. Justice Stevens' conclusion. But by refusing even to conduct the analysis it was directed to make, and by holding that no restraints even existed, the court of appeals erred with far more profoundly negative implications for future antitrust enforcement than had it simply erred in a factual analysis of whether acknowledged restraints were "redeemed."

II. By Ignoring Clear Restraints and the Intention To Achieve Them on the Ground that Competition Is Feasible, the Court of Appeals Would Insulate from Effective Antitrust Enforcement All Horizontal Arrangements Imposing Similar Restraints, Because the Feasibility "Escape Hatch" Is Almost Universally Applicable to Other Markets.

1. In net effect, the court of appeals has ruled in this case that all sellers in a given industry may pool their wares, have a committee of their members jointly sell requirements contracts to the pooled commodities or rights, and have that committee set the price of such contracts to each buyer.

So long as the sellers' agreement recites that the committee's right of sale is "nonexclusive" and it is mechanically feasible for buyers to deal directly with

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reference to "*infra*, Part III" in which the Court explained that only those practices as to which such certainty exists can be deemed unlawful *per se*. Thus, we believe it to be clear that when this Court expressed its uncertainty (at C13) as to whether the practice "on its face" had the effect of restraining competition, it was simply stating in conclusory form the reason why the practice could not be held illegal *on its face*, *i.e.*, illegal *per se* (*see* C19-20 where the Court specifically defined a *per se* illegal practice as one that is "*facially*" restrictive (emphasis added)).

To read the passage as questioning whether the practice had any anticompetitive effect at all that had to be balanced against any procompetitive justification is, we submit, to misapprehend the meaning of the term "on its face" as well as the entire thrust of the majority opinion.

sellers, the court of appeals holds that an arrangement of this nature involves "no anticompetitive effect at all" (A8; *see* A9-10, 19)—and thus no analysis need be made as to its reasonableness.

Hence, all major movie production companies—MGM, Paramount, Warner Brothers, and the like—may pool their films and jointly sell and price requirements contracts to individual television stations and theaters. Electronics companies can do the same thing with their patents; book publishers, with their books. Instead of conspiring to charge their customers $X hundred, or $X thousand, a basic unit, they can agree to distribute the same sums to themselves out of the annual fee.

And tangible commodities are not excluded from the anticompetitive "benefits" of this decision. For example, all steel companies could pool their outputs and jointly sell requirements contracts to each customer at prices set by an industry-wide committee.

Providing a perfect opportunity for price-information sharing and signaling, the joint agency arrangement would allow competitors so inclined to cease meeting clandestinely in hotel rooms. All they need do is have a Board of their presidents openly announce the currently agreed-upon per-use distribution figures (for allocating blanket fees to members) to serve as a focal point for the prices that should be received in any direct negotiations.

That there is not the slightest need or justification for such an arrangement is not irrelevant under the court of appeals' holding—it is, anomalously, the very basis of the determination of no restraint. That the sellers have explicitly admitted that the purpose of the collective is to jack prices higher than competitive prices (as defendants here have admitted with a vengeance[18]), is deemed to be entirely immaterial.

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[18] For example, ASCAP witnesses admitted that their preference for this collective system is: "as individuals we have no strength" and "it's important as a publisher to combine with other publishers" (Goodman Tr. 1631-32); "[i]n unity there is strength and in disunity there is weakness" (Brettler Dep. 201); "ASCAP has a superior

2. Left standing, this decision is a charter for anticompetitive conduct—and a message sent to the

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bargaining position than any one or group of its publishers" (Morris Dep. 720); and the "umbrella" speech rendered by ASCAP's President, Stanley Adams (EX 448), which, in addition to admonishing that "[t]here can be nothing as important as presenting a solid front across the negotiating table" (EX 454) and that "little deal[s] on the side" make "hole[s] in the fabric of the umbrella" (EX 455), articulated the cartel's purpose concisely:

> "To resist the splitting of our ranks so that we can be picked off one by one" (EX 450).

Even ASCAP's economic expert witness, Robert Nathan, was constrained to agree, on questioning by the court:

> "THE COURT: . . . Don't you think it is reasonable to assume that the writer does believe that it is an advantage to be a member of ASCAP because he doesn't have to compete for the price?
>
> "THE WITNESS: I suspect, your Honor, that is true . . . ." (Tr. 3909).

Thus, ASCAP fought the development of direct licensing of movie rights for nearly 30 years (*Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949)); it fought direct licensing of television station rights in the 1960's in *United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964); and it is still waging that battle in *Buffalo Broadcasting Co. v. ASCAP*, 78 Civ. 5670 (Complaint filed November 27, 1978), now pending in the Southern District of New York.

Its first response to this suit was, as described by its President, Mr. Adams: When you "think somebody is going to put a match to your house you generally get a hose to put out the fire" (Dep. 7).

ASCAP's further response was its counterclaim filed in this case, which flatly states that CBS's attempt to enjoin the blanket licensing system is part of a "plan and program" to "depress the price [it] pays for performance rights" (JA 56). If ASCAP's purpose in opposing the elimination of the blanket license is to prevent a depression of the price, its purpose in maintaining the blanket license is obviously to maintain the price. *See also* p. 7 n.8 *supra*.

In other words, ASCAP's argument is substantively identical to the argument made by the Society of Professional Engineers that competitive bidding would pressure price reductions. It is as clear an admission of anticompetitive intent as could possibly be found. *See National Society of Professional Engineers v. United States*, *supra*, 435 U.S. at 684-85 & n.7, 693-94.

antitrust bar that will not easily be dissipated, if it ever is. It says: concerted activity you once thought blatantly illegal may now be worth an antitrust risk, for there is nothing in the essential elements of this decision that renders it inapplicable to other trades.

Not only, therefore, will this decision mislead the lower courts, it will plague the consumers to be victimized by the restraints that it expressly condones and encourages.

3. That the blanket license is a means by which many writers and music publishing corporations agree upon the prices at which they will sell sufficiently demonstrates a restraint, *a fortiori*, under numerous decisions of this Court and the courts of appeals, irrespective of the nonexclusivity of the arrangement, and no matter how feasible buyer-alternatives may be. *E.g.*, *United States v. Container Corp.*, 393 U.S. 333, 335-38 (1969); *Nationwide Trailer Rental System, Inc. v. United States*, 355 U.S. 10 (1957), *aff'g per curiam*, 156 F. Supp. 800, 804-05 (D. Kan. 1957); *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485, 488-89 (1950); *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1136-37 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 130-33 (9th Cir. 1960); *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-24 & n.59 (1940); *Associated Press v. United States*, 326 U.S. 1, 17 & n.17 (1945).

That the blanket license is a means of obtaining from the network user a commitment not to buy in a competitive market during the license term (or, more realistically, not to seek to *create* such a market—not "to embark on a competitive crusade," C37 (Stevens, J.)), and would otherwise delay the creation of such a market for an "inevitable" period of one year (E84; *see* C36 (Stevens, J.)), condemns it is as a restraint under this Court's decision in *Professional Engineers*. [19]

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[19] The district court found here that for CBS to "abruptly cancel its blanket license and seek to fulfill all its music needs by direct licensing

That the blanket license is a method of perpetuating a "disinclination to compete" (D22) on the part of ASCAP's members also substantiates the restraint under this Court's ruling in *United States v. Masonite Corp.*, 316 U.S. 265, 281 (1942).

And the fact that the blanket license is a system for achieving economic discrimination in favor of ASCAP's members additionally brands it as a restraint under the analysis set forth in Mr. Justice Stevens' opinion in this case (C31-32; *see also* Brief of the United States (submitted to the court below) H16 & n.10, 18 n.11).

4. Moreover, while the court of appeals' decision condones these restraints because of the feasibility of a direct licensing alternative, it overlooks the point that they, in fact, constitute restraints on precisely that alternative—for the reasons just articulated, and at least two others as well.

(a) First, when all sellers agree on the price they *should* get—whether in a blanket or per-use system—the very process of arriving at that agreement will necessarily limit competition among those sellers. Here, all copyright

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on the next day is utterly unrealistic" (E42, citations omitted); that CBS could not "switch over to direct licensing without a long period of advance preparation" (*id.*); and that one year would be "the *inevitable* interval between CBS' notice of termination of its blanket license and the date on which it actually commenced direct licensing for all its needs" (E84, emphasis added).

In *Professional Engineers*, all the buyer of engineering services had to do in order to get competing bids was to form a relationship with one engineer, get his price, rescind that relationship, form a new one with another engineer, get his price, and so on. This possibility was explicitly noted in the majority and concurring opinions, 435 U.S. at 684 n.6; *id.* at 700 (Blackmun, J.). The very fact that it delayed the buyer's access to competitive conditions was sufficient to establish the restraint. Yet the delay, for any given buyer, was likely to have been far less than the one-year period of "advance preparation" involved here (E42, 84).

Although the court of appeals opined that the district court had meant only to imply an "outer limit" of one year (A15), the findings themselves—particularly the district court's use of the term "inevitable interval" (E84)—precludes any such interpretation.

proprietors have agreed that they *should* get approximately $1,000 a use from CBS (and that is what they do get and what they *see* on their distribution statements). If CBS were to try to bypass ASCAP, they would still be selling to NBC and ABC through ASCAP at, so far as they are concerned, $1,000 a use. Can it seriously be questioned that that collectively set price—that $1,000 the publisher takes in every time a piece of his music is used on the other two networks—is not going to influence the price at which the publisher is willing to sell to CBS?

Not in this case it can't! Not only is the fact of such influence economically axiomatic,[20] it was admitted flat out, in the most categorical terms, by both groups of defendants and by ASCAP's economic expert witness at trial.[21]

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[20] The economic principle that the focal point of such a collective, or even suggested, price will stabilize actual transaction prices was the basis for the legal presumptions applied in *Nationwide Trailer Rental System, Inc. v. United States*, *supra*, 355 U.S. 10, *aff'g per curiam*, 156 F. Supp. at 804-05; *United States v. National Ass'n of Real Estate Boards*, *supra*, 339 U.S. at 488-89; *Plymouth Dealers' Ass'n v. United States*, *supra*, 279 F.2d at 131-33; *Tingley Rubber Corp., et al.* (FTC Consent Order, June 27, 1980), *reprinted in* [Current] Trade Reg. Rep. (CCH) ¶ 21,718; FTC Statement of Policy, *reprinted in* [Current] Trade Reg. Rep. (CCH) ¶ 39,057; *see also, a fortiori, Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977), *approving White Motor Co. v. United States*, *supra*, 372 U.S. at 268 (Brennan, J., concurring).

[21] Thus, ASCAP admitted during the trial that its per-use schedule "*would inevitably become the focal point around which any direct licensing transactions would take place*" (ASCAP's "Comments on CBS' Latest Statement of the Elements of a Per-Use License," May 24, 1973, at 2, emphasis added).

Its economic expert witness, Robert Nathan, agreed, on examination by the court, that an ASCAP per-use price would "hover over the atmosphere" of direct licensing transactions and be a "referent point" or "point of departure" for such negotiations (Tr. 4182-83). He then agreed on cross-examination that the per-use amounts ASCAP members now receive in distributions (even though the user is billed on a blanket basis) would have the same effect (Tr. 4200-01).

The way in which publishers would so use the ASCAP per-use distribution "referent" was specified by Salvatore Chiantia (President of MCA Music, Vice President and Board member of ASCAP). When asked about the price at which he would be willing to deal directly with

Those are judicial admissions of a party-opponent as to the fact of restraint of competition; CBS was and is entitled to rely upon them fully; and it is inexplicable how the court of appeals could have held CBS to a failure of proof on this issue.

It is even more so in the light of this Court's recent decision in *Catalano, Inc. v. Target Sales, Inc.*, — U.S. —, 100 S. Ct. 1925 (1980) (per curiam), which was called to the court of appeals' attention on the petition for rehearing.

The holding in *Catalano*, that an agreement to eliminate a small price discount is illegal *per se*, cannot logically be reconciled with the holding of the court of appeals here that an agreement to set full, joint sales prices is totally free of any anticompetitive impact whatever. Particularly is that so when it is recognized that, in *Catalano*, the anticompetitive effect was disputed by the defendants and deemed conjectural by this Court (100 S. Ct. at 1928), whereas, in the present case, the impact of blanket prices (and per-use distribution figures) on any direct sales

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CBS, his immediately expressed point of departure was the current ASCAP distribution level of approximately $1,000 per use, and he reasoned from there to a price of $3,000 (Tr. 2943-44). Illustrating the same proposition was the testimony of Mr. Vogel (President of Jerry Vogel Music Co., Inc., proprietor of one of the foremost catalogs in the music publishing business, PX 883):

> "Q. Assuming that you had made the decision to deal with CBS for whatever reasons would you quote different prices for different uses?
>
> "A. No, same price, same as ASCAP" (Dep. 934-35).

The similar point was admitted succinctly by the BMI defendants:

> "CBS cannot hope to persuade any BMI affiliate to license directly unless it proposes to pay more than BMI would" (JA 106).

Indeed, as BMI stated to this Court in its 1978 petition for writ of certiorari:

> "To be sure, the price of a BMI license—like any other price in a market—has an effect on what would be charged in direct licensing transactions. . . . Thus, the price of a blanket license acts as a check on direct license prices . . . ." Pet. 15.

And, in its *amicus* brief submitted to the court below, the Department of Justice stated that an "ASCAP or BMI fee schedule" would "have a direct impact on the price of compositions in a direct licensing market . . . since the product—a single composition—is the same" (H23 n.19).

prices was a fact admitted point blank by defendants (*see* pp. 23-24 & n.21 *supra*).

(b) The second obvious restraint on any direct licensing inheres in the problem of music-in-the-can (*i.e.*, music already recorded in the soundtracks of movies and films, whether in CBS's inventory or not, for which CBS has no performance rights licenses). Apart from defendants' equally categorical admissions on this point (*see* p. 6 *supra*), the court of appeals itself acknowledged that music-in-the-can was an "event [in which] no meaningful price competition among copyright owners would occur" (A18-19).

It is difficult to imagine a clearer explication of an anticompetitive effect than the deprivation of "meaningful price competition" which this statement acknowledges.

To predict, as did the court of appeals, that the music-in-the-can problem would not result in "unconscionably high fees" or "hold-up[s]" (A16, 17) is patently beside the point, as Mr. Justice Stevens and the Department of Justice instructed (C38 n.31; H17-18). The deprivation of "meaningful price competition" is clearly enough.

Moreover, to conclude, as did the court of appeals, that CBS is to blame for acquiring a film inventory without directly licensing music-in-the-can, and that the problem is, in any event, of short duration ("undercut by the turnover in the CBS inventory," A16-17 & n.9), is to overlook almost every fact of significance to this case. For example:

> (i) It overlooks the fact that in the 1940's, when television networks commenced operations, ASCAP's rights to license the pool were exclusive (*see* C10; D4-5); that CBS's inventory of programs and films had therefore to be built up at a time when there was *no* source for music performance rights *other than* ASCAP; and that in any given year after the 1950 consent decree (which, for the first time, removed ASCAP's contractual exclusivity) CBS had the same music-in-the-can problem it has now.

(ii) It overlooks the fact that the postponement of "meaningful price competition" which would occur while CBS used up its inventory of music-in-the-can does not "undercut" the restraint, but confirms it under *Professional Engineers* (*see* 435 U.S. at 684 n.6; *id.* at 700 (Blackmun, J., concurring); *see also* p. 21 & n.19 *supra*).

(iii) And it totally loses sight of the court of appeals' own concession that, even as to "canned" programs and films *not already in the CBS inventory*, CBS would be deprived of "meaningful price competition" (A18).[22]

5. But restraints this stark and pervasive are not the only anticompetitive characteristics this decision ducks on the "feasibility" ground; also elided are literally scores of admissions of defendants' specific intent to achieve those restraints which establish their existence beyond question.

Some of the highlights of such proof are outlined above, p. 19 & n.18. Admissions of this sort—that the blanket license must be maintained to prevent a depres-

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[22] The court of appeals' statement regarding the deprivation of "meaningful price competition" was, indeed, a specific reference to programs or films not yet in CBS's inventory—*i.e.*, those on which CBS would wish to bid in the future but on the sound tracks of which the producers had already recorded copyrighted music without first obtaining performance rights licenses directly.

Of course, if ASCAP were enjoined from collectively licensing music for television network programs, so that all three networks were in the same boat, the producers or distributors of such programming materials would have no choice but to obtain music performance rights *before* offering the materials for network bids.

As to present network inventories, the music-in-the-can problem is curable by decree, but not otherwise. In *Alden-Rochelle, Inc. v. ASCAP*, *supra*, 80 F. Supp. at 904, the court, noting the argument that music-in-the-can would place the user "in an obviously impossible bargaining position," enjoined ASCAP and its members from enforcing copyrights to such performances. The alternative would be for the court to set per-use prices for such uses, derived from marketplace evidence of competitive prices arrived at in direct licensing transactions—a system that would remain in effect only until existing inventories were exhausted.

sion of price (JA 56); that the purpose of this system is "to resist the splitting of our ranks" (Adams EX 450); that "[i]n unity there is strength and in disunity there is weakness" (Brettler Dep. 201); and many, many others to the same effect—are far greater than necessary to show intent and thus to reinforce the conclusion of anticompetitive effect (C19-20) even were it otherwise in doubt. Such admissions, in fact, moved the district court to find that ASCAP members have a "strong preference" for blanket licensing because of their "apprehens[ion]" of "intense competition" and their desire for "bargaining clout" (E60-61; *see* C37 n.30 (Stevens, J.)).

It is rare, indeed, for an antitrust plaintiff to be able to amass such proof. To the court of appeals, however, it is worthless evidence.

6. To see further how the court of appeals' decision turns the antitrust laws on their head, one need only contrast the treatment accorded mergers with that given here to a cooperative arrangement.

As this Court has indicated, many mergers of competing firms will be permitted (because of the efficiencies achievable by such complete economic integration), even where horizontal, nonmerger arrangements on price would be enjoined (*see* C23-24).

Plainly, however, a merger of all the music publishing corporations now joined in ASCAP would result summarily in a holding of liability under Sections 1 and 2 of the Sherman Act as well as Section 7 of the Clayton Act (15 U.S.C. §§ 1, 2, 18). The same would be true of any other industry in which all sellers merged, or any firms did, representing more than 50% of the market.

But henceforth, competitors that would not be allowed to merge could still suppress price competition among themselves by entering into nonexclusive, joint sales consortia. These must now be blessed, ruled the court of appeals, even though they are less efficient than complete economic integration—indeed, even if less efficient than the normal, competitive method of sale—for neither efficiencies nor any other argument of justification need be proffered by the perpetrators of such an arrangement.

CONCLUSION

This Court issued a writ of certiorari to review the court of appeals' first decision in this case because this Court felt that the holding of *per se* illegality threatened arguably justifiable concerted activity. The court of appeals' decision on remand, however—in effect holding concerted activity *lawful per se*— is far more threatening to the "central nervous system of the economy" (C23) in what it indiscriminately endorses, than was the first opinion in what it proscribed.

We therefore submit that a writ of certiorari should again be granted, and, at minimum, the court of appeals again directed to make the necessary factual analysis. Should the Court agree that the legal error committed by the court of appeals is clear and that no cognizable justification for restraints of trade has even been argued, much less established, it may wish to consider summary reversal.

Respectfully submitted,

ALAN J. HRUSKA
One Chase Manhattan Plaza
New York, N. Y. 10005
(212) 422-3000

Attorney for Petitioner

Of Counsel:
DAVID BOIES
LOUIS M. SOLOMON

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

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